1992

Tori K. Evans v. Robert L. Evans : Brief of Appellant

Utah Court of Appeals

Randy S. Ludlow; attorney for appellee.

Richard S. Nemelka; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

TORI K. EVANS,	)	
	)	
Plaintiff/Appellant,	)	Appellate Case No. 920631-CA
	)	
v.	)	Priority No. 4
	)	
ROBERT L. EVANS,	)	
	)	
Defendant/Appellee.	)	

APPELLANT'S BRIEF

Appeal from a Decree of Divorce and Order Denying Motion for New Trial entered in the Third Judicial District Court, Salt Lake County, State of Utah, Honorable J. Dennis Frederick

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AUTHORITIES

CONSTITUTIONAL PROVISIONS, STATUTE AND RULES

Utah Code Annotated 1953, as amended

Section 30-3-10

(1) . . . In determining custody, the Court shall consider the best interest of the child and the past conduct and demonstrated moral standards of each of the parties.

(2) In awarding custody, the Court shall consider, among other factors the Court finds relevant, which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the noncustodial parent as the Court finds appropriate.

Section 30-3-5(2)

The Court may include, in an Order determining child support, an Order assigning financial responsibility for all or a portion of child care expenses incurred on behalf of the dependant children.

Utah Code of Judicial Administration

Rule 4-903 - Uniform Custody Evaluations

(2) In divorce cases, one evaluator shall perform the evaluation on both parties and shall submit a written report to the Court, . . .

(3) Evaluators must consider and respond to each of the following factors:

A. The child's preference;
B. The benefit of keeping siblings together;
C. The relative strength of the child's bond with one or both of the perspective custodians;
D. The general interest in continuing previously determined custody arrangements where the child is happy and well adjusted;
E. Factors relating to the perspective custodian's character status or their capacity or willingness to function as parents, including:

(i) Moral character and emotional stability;
(ii) Duration and depth of desire for custody;
(iii) Ability to provide personal rather than surrogate care;
(iv) Significant impairment of ability to function as a parent through drug abuse, excessive drinking or other causes;
(v) Reasons for having relinquished custody in the past;
(vi) Religious compatability with the child;
(vii) Kinship;
(viii) Financial condition.

F. Any other factors deemed important by the evaluator, the parties or the Court.

STANDARDS OF REVIEW AND AUTHORITY

1. The trial court must consider that "a child custody proceeding is equitable in nature and must be based primarily and foremost on the welfare and interest of the minor children. The Court must, in the custody dispute, give the highest priority to the welfare of the children over the desires of either parent. Awarding custody and visitation rights are within Trial Court's discretion and will be reversed upon abuse of that discretion." Kallas v. Kallas, 614 P.2d 641 (Utah 1980); Dana v. Dana, 789 P.2d 729 (Utah App. 1990); Riche v. Riche, 786 P.2d 465 (Utah App. 1989).

2. The factors the trial court should consider in determining the best interest of the child in a custody dispute are the need for stability in custodial relationship in environment; maintaining an existing primary custodial bond; the relative strength of the parental bonds; the relative abilities

of the parent to provide care, supervision and a suitable environment for the children and to meet the needs of the children; preference of a child able to evaluate the custody question; the benefits of keeping siblings together and enabling sibling bonds to perform; character and emotional stability of the custodian; the desire for custody; the apparent commitment of the proposed custodian to parent. Moon v. Moon, 790 P.2d 52, (Utah App. 1990).

3. The identity of the primary caretaker during the marriage, the parent with whom the child has spent most of his or her time, is prominent as a factor for determining custody. Moon v. Moon, (supra).

4. Another main factor that the trial court must consider is whether the custodial parent (including the parent with temporary custody) allows the child frequent and continuing contact with the non-custodial parent. Utah Code Annotated, §30-3-10(2); Chase v. Chase, 387 P.2d 556 (Utah 1963).

5. The trial court may consider a recommendation from an independent custody evaluator but said recommendations are advisory only and in no sense controlling. Mecham v. Mecham, 544 P.2d 479 (Utah 1975).

6. The trial court should not limit overnight visitation when the noncustodial parent has previously had the minor child on a continual basis, including overnight, during the preceeding

18 months. Moon v. Moon, supra; Deeben v. Deeben, 772 P.2d 973, 974 (Utah App. 1989).

7. The court abused its discretion in failing to enter sufficient findings setting forth any special and unusual circumstances that would justify the restricted visitation awarded to the plaintiff which was punitive in that it awarded plaintiff considerably less visitation time with the minor child than defendant was entitled to exercise during the pendency of the proceedings which by defendant's own testimony exceeded eight days during each month. See Carlson v. Carlson, 584 P.2d 864 (Utah 1978).

8. Over emphasis of one factor by the trial court in consideration of a custody award is abuse of discretion. See Move v. Move, 102 Idaho 170, 627 P.2d 799 (1981).

9. It is essential that the trial court acts within its broad discretion that a basis for a determination of custody and award of visitation be articulated in clear factual findings. Jensen v. Jensen, 775 P.2d 436 (Utah App. 1989).

10. It is an abuse of discretion to have given greater weight to the recommendation of Dr. Stewart than other evidence presented at the trial when said recommendation is based on speculation. Mecham v. Mecham, 544 P.2d 479 (Utah 1975); Walker v. Walker, 707 P.2d 110 (Utah App. 1985);

11. A finding of fact cannot be based on mere speculation. Orson v. Warwood, 255 P.2d 725, 123 Utah 111; Fitzgerald v. Fitzgerald, 369 P.2d 398, (N.M. 1962).

12. Substantial evidence is that of sufficient quantum and quality to persuade a responsible mind of the truth of a declared premise. First National v. County Board, 799 P.2d 1163 (Utah 1990); Nejin v. City of Seattle, 698 P.2d 615 (Wash. App. 1985).

13. It is an abuse of discretion when the distribution of the debts by the trial court is unequitable, based upon the parties' financial circumstances. Rasband v. Rasband, 752 P.2d 1331 (Utah App. 1988); Smith v. Smith, 751 P.2d 1194 (Utah App. 1984).

STATEMENT OF CASE

A. NATURE OF CASE

Appeal from a Decree of Divorce and Order Denying Motion for New Trial entered in the Third Judicial District Court, Salt Lake County, State of Utah.

B. COURSE OF PROCEEDINGS

The Complaint was filed by the plaintiff on the 5th day of November, 1990 (R. 2-6), and the defendant filed a Complaint on the 30th of January, 1991 (Civil Number 914900025) and said two actions were consolidated by Order of the Court on the 8th of February, 1991 (R. 12-15) as D-90-4449 and the Complaint in the later action filed was treated as a Counterclaim. Plaintiff was granted temporary custody of the minor child and defendant was given visitation (R.61, 83-85) which was subsequently changed to two days per week.

C. DISPOSITION

The trial was commenced May 28, 1992 and concluded June 2, 1992 at which time the Court announced its ruling and decision. The Findings of Fact, Conclusions of Law and Decree of Divorce prepared by defendant's counsel were signed by the Court on the 5th day of July, 1992 (R. 169-185) which Decree awarded defendant custody of the minor child, plaintiff restricted visitation rights, ordering plaintiff to pay child support, ordering the defendant to pay one-half of the fee to Dr. Stewart and denying plaintiff's request for reimbursement for child care expenses incurred. The Court denied the Motion for a New Trial and Objections to Findings of Fact on September 8, 1992 (R. 221-223).

STATEMENT OF FACTS

1. Plaintiff and defendant were married March 9, 1990 in Salt Lake County, State of Utah. The parties separated three months later on the 9th of June, 1990. The minor child, Paige, was born approximately six months later on December 18, 1990 and continued from birth until the time of the trial in this matter in the continuous care, custody and control of the plaintiff who was the primary caretaker of said minor child for the first 18 months of her life (Vol. I, T. 4-5, Addendum "A", page 5, ¶ 11.

2. Plaintiff also had custody of a minor child, Brandi, from another marriage, age 4 1/2, who resided with the plaintiff and the minor child, Paige, during the entire first 18 months of said minor child, Paige's life. Brandi had a very close relationship with Paige (Vol. I, T. 27-29).

3. Plaintiff filed for divorce on November 5, 1990 on the grounds of irreconcilable differences alleging that the defendant was moralistic and rigid in his religious beliefs and talked about Satan alot (Vol. I, T. 5).

4. From the minor child's birth on the 18th of December, 1990, until the trial in this matter on the 2nd of June, 1992, the plaintiff freely cooperated in granting to the defendant more than reasonable visitation with the minor child of which consisted of at least eight days per month (Vol. I, T. 7-8).

5. The plaintiff was awarded the temporary custody of the minor child, Paige, after a hearing before Commissioner Allphin on the 22nd day of January, 1992 (R. 12-15)

6. The parties' attorneys jointly stipulated to the appointment of Dr. Elizabeth Stewart to do a custody evaluation (R. 36). Dr. Stewart conducted interviews with the defendant and a short phone conversation with defendant's mother. Dr. Stewart met with the plaintiff on approximately five occasions for a total of only 4-5 hours. Further, Dr. Stewart interviewed

plaintiff's mother, father and step-mother, the child's pediatrician and the day care provider and observed the minor child in the presence of both parents and one time with her sister, Brandi (Vol. I, T. 103-104; Vol. III, T. 51-58). When Dr. Stewart tested the parties she failed to conduct any tests whatsoever on the sister, Brandi (Vol. I, T. 136).

7. Dr. Elizabeth Stewart performed an incomplete and inadequate custody evaluation and charged $3,000 for the same and submitted the report which was admitted into evidence.

A. Dr. Stewart only saw the minor child with each of the parents on one occasion each on October of 1991 (Vol. I, T. 103-104).

B. The minor child, Paige, was only ten months old when Dr. Stewart observed her. Dr. Stewart failed to conduct any update observations or evaluation for the approximately six-seven month period prior to the trial in this matter. Further, Dr. Stewart made no home visits and did not contact any other collateral parties. Dr. Stewart only gave two tests, the MMPI and Rotter sentence exam (Vol. I, T. 103).

C. Plaintiff felt that Dr. Stewart was prejudiced against her and did not hear what she was told or pay attention to important details given to her (Vol. III, T. 20-21).

D. Dr. Stewart failed to interview the minor child, Brandi, individually, or give her any tests (Vol. III, T. 57-59).

E. Dr. Stewart had a negative and somewhat prejudicial opinion of plaintiff's mother and failed to give her any tests whatsoever but was concerned about her mother's attitude toward fathers and men (Vol. I, T. 117, 118 and 109).

F. Dr. Stewart's main basis for recommending the defendant being awarded custody was based on Dr. Stewart's speculative opinion that the plaintiff developed attitudes and values towards fathers from her own dysfunctional family structure that might affect the minor child, Paige, in the future. Dr. Stewart also speculated that in the future the defendant would teach the child to get along with others and to learn solid values better than the plaintiff (Addendum "A", Vol. I, T. 109, 120-121).

G. However, Dr. Stewart concluded that the plaintiff was:

(1) the primary caretaker of the minor child, Paige;

(2) that the minor child, Paige, was alert, good-natured, responsive and quite outgoing;

(3) that the minor child, Brandi, had a big sister relationship with Paige,

(4) that the minor child, Brandi, was not a problem child and did not need to be tested;

(5) that the minor child, Paige, is very closely bonded to the plaintiff;

(6) that plaintiff's moral behavior was on par with the defendant;

(7) that the plaintiff's desire for custody of the minor child was on par with the defendant;

(8) that each party would have to obtain surrogate care;

(9) that neither party had an problems with drugs or drinking;

(10) that the factor of kindred or grandparents was about the same;

(11) that the plaintiff had done a good job as a mother;

(12) that plaintiff was capable of raising the minor child, Paige, and had a desire to raise said child;

(13) that the plaintiff balanced her work and family well and had been successful as a mother;

(14) that plaintiff was very loving and attached to her children;

(15) that plaintiff made friends easily and was outgoing (Vol. I, T. 5-47)

(16) Dr. Stewart recommended restricted visitation but stated no basis for the same (Vol. I, T. 137, Addendum "A").

8. Dr. Paula Swaner, a Clinical Psychologist, was called as a witness for the plaintiff. Dr. Swaner had spent two years meeting with the plaintiff as her therapist spending approximately thirty hours with the plaintiff (Vol. III, T. 15-20).

A. Dr. Swaner testified that the plaintiff was not impulsive or volatile and had a positive attitude toward men and fathers (Vol. III, T. 23, 28).

B. Dr. Swaner found the defendant, after meeting with him on two occasions, to have suffered from a narcissistic injury when he was lashing out at the plaintiff and threatened to take the minor child from the plaintiff since the time the plaintiff was three months pregnant (Vol. III, T. 18, 19 and 23).

C. That it was of primary importance to keep Paige and Brandi together and that Dr. Stewart's restricted visitation schedule would not allow enough time for Brandi and Paige to maintain their relationship (Vol. III, T. 26).

D. That it would be a traumatic experience for the minor child, Paige, to change the custodial environment at the minor child's development stage of approximately 13 to 20 months and it would be best for the child to remain with the primary caretaker (Vol. III, T. 27).

E. That plaintiff's custodial environment as primary caretaker met all of the necessary needs of the minor child, Paige, (Vol. III, T. 40-41).

F. That Dr. Swaner did not agree with Dr. Stewart's recommendation and felt that the custody arrangement should not be changed based upon plaintiff being the primary caretaker and that any change at this time in the child's life would be traumatic and adverse to her best interests (Vol. III, T. 21-28).

9. That Dr. Johanna McManemin, a Clinical Psychologist, testified on behalf of the plaintiff. Dr. McManeimin performed an evaluation on Brandi and reviewed Dr. Stewart's report, the MMPI results and the raw data and notes of Dr. Stewart. Dr. McManeimin did not agree with Dr. Stewart's recommendation either (Vol. III, T. 51-52).

A. Dr. McManemin believed that Dr. Stewart's statement that the defendant was more emotionally stable than the plaintiff was based upon speculation since there was very little information on Mr. Evans and the test information was approximately the same for both parties (Vol. III, T. 54-55).

B. That it was extremely important to keep Paige and Brandi together and that changing the custody would be traumatic for Paige due to the fact that it was critical for her to stay with the primary caretaker (Vol. III, T. 55-57).

C. That Dr. Stewart did not spend any individual time with Brandi or test Brandi. Further, that Brandi was an exceptionally bright and well-adjusted child, played well with Paige and had a good relationship and bond with Paige. Further,

Brandi had a good relationship with her father. More importantly was the fact that Brandi was not a beneficiary of any negative attitude toward fathers or men which would be the best evidence of the plaintiff's custodial environment for Paige as compared to the speculation used by Dr. Stewart. Further, that looking at the personality and characteristics of Brandi was a good indication as to the plaintiff's parenting and good evidence as to what kind of child Paige would be at the same age or thereafter (Vol. III, T. 57-62).

10. Myra Brodale, the daycare provider was called as a witness for the plaintiff and testified that both Paige and Brandi were in her day care from February 1992 through the time of the trial and that Brandi had been in the day care for approximately two years and was a "model child and very well adjusted" (Vol. II, T. 22-24).

11. Each party testified for themselves and called additional witnesses that were biased toward the party that called the same.

12. Plaintiff was employed with a gross monthly income of approximately $1,456.00 and the defendant was employed with a gross monthly income of approximately $2,400.00 (Vol. I, T. 46).

13. The plaintiff incurred daycare expenses of approximately $1,100.00 for and in behalf of the minor child, Paige (Vol. I, T. 41-43).

SUMMARY OF ARGUMENT

1. The minor child, Paige, was a happy, healthy and well-adjusted child who had been in the exclusive care, custody and control of the plaintiff for the first 18 months of said child's life. Said child had a stable environment and a close bond to her mother, the plaintiff, and to her half-sister, Brandi. The Court's determination of the change of custody based upon speculation as to what might happen in the future as compared to the child's stability and, further, disregarding the potential trauma of a change of custody was, in fact, an abuse of discretion by the Court.

2. The Court gave undue emphasis and weight to Dr. Stewart's evaluation and recommendation and her concern as to what might happen in the future based upon the plaintiff and plaintiff's mother's attitude toward men. The Court did not fully consider and give weight to all of the necessary factors in determining custody which weighed heavily in favor of the plaintiff. Further, the Court made findings based upon speculation and not substantial evidence in determining the award of custody. All of the above was an abuse of discretion.

3. The Court knew that the defendant, during the first 18 months of the child's life, had more than reasonable visitation with said minor child of approximately two days per week. However, when the Court changed custody it restricted the

visitation of the plaintiff to less than what the defendant had during the pendency of the matter. Based upon the circumstances of this case where the plaintiff had been the sole primary caretaker of the minor child for the first 18 months of her life, it was an abuse of discretion and error for the Court to restrict plaintiff's visitation rights to now allow any overnight visitation. It was also a total disregard of what would be in the best interests of the minor child. Further, there was not sufficient findings of fact to support said restricted visitation.

4. There is also a lack of findings in regards to the Order of the Court for the plaintiff to pay one-half of the evaluation to Dr. Stewart. Said Order was not fair and equitable and an abuse of discretion.

5. The Court incorrectly reviewed the evidence and failed to award the plaintiff her incurred day care expenses when, in fact, she was entitled to the same.

ARGUMENT

POINT I

A child's need for stability is a fundamental consideration in custody awards in determination of a child's best interest. Paryzek v. Paryzek, 776 P.2d 78 (Ut. Ct. App. 1989). The Trial Court failed to fully consider stability and continuity and the potential trauma in Paige's life by changing the custodial environment. The Court in its ruling (Addendum "B") appeared to just basically read from the report of Dr. Stewart in regards to the child's need for stability and preventing a traumatic experience rather than expressing a finding based on all the evidence. For example the Court failed to consider that after one year of the plaintiff being the sole primary caretaker, the minor child, Paige, was alert, responsive, good-natured, passing developmental milestones in a normal fashion, very affectionate, responsive to people adn quite outgoing and presented no problems whatsoever to either parent (Addendum "C", Observations of Paige Evans.

Further, the minor child, Brandi, age 4 1/2, as observed by the day care provider, Myra Brodale, and Dr. McManemin, was also a well-behgaved, well-adjusted, bright, model child (Vol. II, T. 24-29) who was closely bonded to Paige and played extremely well with her (Vol. II, T. 24, Vol. III, T. 58-59). These observations were made just prior to trial and 8-9 months after Dr. Stewart's observations.

Another part of the evidence the Court didn't consider was the potential trauma to Paige in June 1992 by transferring the custody. At that time there was still a close, emotional bond between Paige and the plaintiff as well as an increased bonding with the sister, Brandi. The Court based its finding of no potential trauma on statements of Dr. Stewart about the child in October of 1991 and not what the circumstances were in May and June of 1992. Dr. McManemin tested, interviewed and evaluated the minor child, Brandi, in May of 1992, just a couple weeks prior to the trial. She also interviewed and observed Brandi at that time with the minor child, Paige. Dr. McManemin specifically indicated that it would be traumatic to change the custody arrangement for Paige due to the fact that she was now between the 18 month and two year stage which was critical in a child's development. Dr. McManemin stated it would be traumatic at this time to remove Paige from her primary caretaker and from Brandi. Dr. Steward never addressed this issue since her evaluation was done eight or nine months previous (Vol. III, T. 56-57).

Further, Dr. McManemin observed that Dr. Stewart did not spend any individual time with Brandi and did not seem much concerned with the relationship between Paige and Brandi (Vol. III, T. 57-58). Again, the Court relied upon Dr. Stewart's evaluation that was done many months prior to the Trial as

compared with Myra Brodale and Dr. McManemin's observations and evalution as to the stability and relationship between the two minor children that was done a week or so prior to the trial. Dr. McManemin specifically observed the two minor children playing together a week prior to the trial and indicated that there was a very strong bond between the two girls and that Brandi was protective of Paige and enjoyed being with her and that Paige was bonded very closely to Brandi (Vol. III, T. 59). Dr. McManemin said that the change in custodial arrangement in June 1992 would be extremely traumatic for Paige, not only by being taken away from her primary caretaker, the mother, but also from her relationship with Brandi. Also, Dr. McManemin was adamant that Paige and Brandi be kept together since they are close enough in age that there would be a long term bond and it would be traumatic for Paige to be separated from her sister as well as her mother (Vol. III, T. 56-57).

It is now apparent that Dr. Stewart's speculation as to the trauma Paige would not experience by the change of custody and the Court's blind reliance on the same were inaccurate. In August and October 1992, a few months after the change of custody, the minor child, Paige, was observed and evaluated by Sherrie S. Reynolds, a psychologist and Dr. McManemin who indicated that the minor child had become more cautious, suspicious, socially appeared guarded, anxious, apprehensive and unhappy (Addendum "D" and "E").

As to the stability of the plaintiff as compared to the defendant, the Court only parrots the statements made by Dr. Stewart that were, in fact, rebutted by Dr. Swaner and Dr. McManemin. Specifically, Dr. Stewart only spent a few hours with the plaintiff whereas Dr. Swaner had been in therapy with the plaintiff for over two years spending over thirty hours with her. Dr. Swaner indicated that the plaintiff was not impulsive, was not insensitive to the feelings of others, did not dislike men and, in fact, was emotionally stable (Vol. III, T. 12, 23). Further, Dr. McManemin who reviewed the MMPI raw data and notes of Dr. Stewart concluded that any statement that one parent was more emotionally stable than the other was pure speculation and not based on any facts that could be retrieved from either the notes or the testing. Dr. McManemin found that there were very few facts and information on the defendant and the tests and information were about the same for both parties (Vol. III, T. 52-55). Again, Dr. Stewart's opinion was based on very limited information; whereas, Dr. Swaner, through two years of counselling, would have a better understanding and idea in regards to the emotional stability of the plaintiff. The conclusion appears to be that the Court did not carefully consider the evidence, but only adopted Dr. Stewart's opinions, and prejudice toward the plaintiff (Vol. III, T. 21). The Court's apparent reliance upon information about the stability and

bonding of Paige, Brandi and the plaintiff eight or nine months prior to the trial rather than their relationship and physical and emotional well-being at the time of the trial was not a careful consideration as to what would be in the best interest of Paige and only a consideration of the court's view of the parties. That was an abuse of discretion.

POINT II

The Trial Court further abused its discretion in awarding custody of the minor child, Paige, to the defendant since the evidence presented favored the plaintiff in the majority of the relevant factors that are stated in Moon v. Moon, (supra). First, and one of the important factors, is to identify the primary caretaker during the marriage and the parent with whom the child has spent most of her time. This is a prominent factor for determining custody. There is no dispute whatsoever that plaintiff was not only the primary caretaker but, in fact, since the parties were separated prior to the birth of the minor child the only caretaker because the defendant only had daytime visitation two days a week (Vol. I, T. 7-8). Dr. Stewart found that the plaintiff was the primary caretaker (Addendum "A", p. 11) and the Court's only rationale to offset this factor was to state that the plaintiff had a negative attitude toward the defendant and toward men and in the Court's view that would

outweigh the fact that the child lived entirely with the plaintiff during the first 18 months of her life. It seems to be apparent that the Court, as well as Dr. Stewart, formed some kind of personal bias toward the plaintiff and then made their findings and recommendation and ruling therefrom rather than having an open and unbiased attitude in reviewing all of the information and evidence and then coming to a conclusion in regards to an award of custody.

A second factor, as stated in Moon v. Moon for determining what is in the best interests of the child, is the need for stability which was addressed in Point I of this argument.

Another factor mentioned in Moon v. Moon is maintaining an existing primary custodial bond. Again, we have already previously discussed in Point I of this Argument and there is no question that the primary custodial bond was between the minor child and the plaintiff.

Another factor mentioned in Moon v. Moon is the relative strength of the parental bonds. The Court concluded that the parental bond between the child and the two parents was equally strong based on Dr. Stewart. There is nowhere in the testimonies of witnesses or in Dr. Stewart's evaluation of any evidence to substantiate the bond between the minor child and the defendant. Dr. Stewart only observed the minor child with the defendant when

the child was less than a year old and still being nurtured by her mother (Vol. I, T. 102). However, both Dr. McManemin and the day care provider, Myra Brodale, observed the close bonding between the minor child, Paige, and her mother for the six months prior to the trial and, in fact, up to a week before the trial and testified of the strong bond between the plaintiff and the minor child (Vol. III, T. 58-59). Dr. Stewart did not do an update in her evaluation and had no evidence to present in regards to the bonding between the child and the defendant from the time when the child was ten months old until the child was 18 months old.

Another factor as stated in Moon v. Moon is the ability of the parent to provide care, supervision and a suitable environment for the child and to meet the needs of the child. Again, there is no question that the plaintiff provided the care and satisfied the needs of the child for the first 18 months of the child's life. Dr. Stewart indicated that the plaintiff had taken care of the physical needs of Paige and all of the other evidence presented indicated that Paige was a healthy, happy child and that the minor child, Brandi, after 4 1/2 years of being in the environment of the plaintiff was a happy, healthy, model child. The Court, based on Dr. Stewart's recommendation had to speculate in regards to whether or not the defendant would create a suitable environment for said child. It should be noted

that Dr. Stewart's opinions were based on a very limited amount of information and observations and none of which occurred within six months prior to the trial.

The best evidence that was presented to the Court in regards to the environment in which Paige was involved for the first 18 months of her life was the testimony of Dr. McManemin and the day care provider, Myra Brodale, as to the emotional and well-being of the minor child, Brandi, who had also been in the same environment (Vol. II, T. 24-29 and Vol. III, T. 58-59). Based on that evidence, and not Dr. Stewart's speculation, the environment with the plaintiff was not only stable but extremely positive and emotionally rewarding for Paige. There were no negative characteristics in the minor child, Brandi, or in the minor child, Paige. However, the Court relied primarily on Dr. Stewart's speculative opinion that the minor child might be adversely affected in the future due to the plaintiff's dysfunctional family history (Vol. I, T. 10, Addendum "B"). The Court adopted Dr. Stewart's reliance upon her unsupportable conclusion that plaintiff's alleged attitude toward the defendant and men was negative and exclusionary and would be passed down to plaintiff's child. It seems clear then that the Court's approach is comparable to outdated psychological reasoning that actual behavior and present circumstances are not as good of indicators as to an environment as so-called theoretical hypotheses and unsupported speculations.

The preference of the child is not really applicable since the child was not old enough to evaluate the custody question; however, Dr. Stewart's observations were based on very limited contact between the parties whereas the day care provider and the fact that the plaintiff cared for said minor child would be better indicators in regards to the preference of the child. It would seem apparent from the evidence that was presented to the Court that a minor child under the age of 18 months would have a great preference for the parent with whom said minor child had resided for said period of time.

Another factor mentioned in Moon v. Moon is the benefit of keeping siblings together and enabling sibling bonds to perform. The Court and Dr. Stewart downplay this factor and stated that the child is too young to have bonded with the sibling, Brandi. However, said factor also refers to enabling sibling bonds to form. It is obvious from the testimony of Dr. McManemin and Dr. Swaner that the limited amount of visitation awarded by the Court would not sufficiently allow the sibling bonds between Paige and Brandi to continue to grow (Vol. III. T. 26); however, of more importance is the fact that there was already a very strong emotional and physical bond between said children. Dr. McManemin observed said bonding a week or so prior to the trial and since Dr. Stewart performed no evaluation of the minor child, Brandi, and made no update it is somewhat dubious that she would be able

to make any credible evaluation in regards to the strength of the bond between said minor children at the time of the trial.

In regards to the desire for custody and the apparent commitment of the proposed custodial parent, both additional factors mentioned in Moon v. Moon, the Court and Dr. Stewart concluded that it was somewhat equal between the parties. This is slightly in contradiction to the evidence since the defendant initially would not even admit that the minor child was his and asked the Court to have a DNA test to determine whether or not he was ever the father. This is without any evidence whatsoever that the plaintiff had been unfaithful during the marriage (R. 12-15).

The factor in Moon v. Moon that the Court over emphasized was the character and emotional stability of the parties. The Court seemed to put great weight on the finding by Dr. Stewart that the plaintiff and plaintiff's mother had negative attitudes toward men. Further, it was not equitable that the Court put such great weight on the opinion of Dr. Stewart as to the psychological conditions of the two parties when all Dr. Stewart did was give them a couple of simple psychological tests and meet with them for a few hours. It is not likely that a very accurate analysis of a person's characteristics can be made with such a small amount of input and information. On the other hand, Dr. Swaner met with the plaintiff for at least over thirty hours in therapy and would be

better qualified and more credible in regards to giving an opinion in regards to the plaintiff's emotional makeup. However, the weight the Court gave said evidence was disproportionate and the weight that the Court gave the evidence in regards to the current physical and emotional well-being of both children at the time of trial was also disproportionate the other way. The proof is in the pudding and not in the attempt to conjecture what the recipe may be. Both Paige and Brandi were happy, well-adjusted children and that was a direct result of the psychological characteristics and nurturing of the plaintiff. For the Court to concentrate so much on one factor in regards to basing its award of custody was not appropriate. As is stated above, the evidence favored the plaintiff in the majority of the factors that the Court needed to consider pursuant to Moon v. Moon.

Both Dr. Stewart and the Court seemed to be offended by the possibility that a woman might believe that she could raise a child to be a well-adjusted and emotionally happy child without alot of contact with the father. However, that happens every day since many fathers refuse to support or have contact with their children. The Court should have looked at the present existing facts at time of trial and not speculation. The important issue was what were Brandi and Paige like and based thereon what was the influence that the plaintiff was having and would have on the development of Paige.

There is no question that the Court placed greater emphasis on the Testimony and evaluation of Dr. Stewart than it did on all of the other evidence presented. This is contrary to the parameters set by the Appellate Court and, specifically, the over-emphasis of one factor in consideration of a custody award is an abuse of discretion. See Move v. Move, 102 Idaho 170, 627 P.2d 799 (1981). Further, it is an abuse of discretion to have given greater weight to the recommendation of Dr. Stewart (See Standard of Review and Authorities).

Findings of Fact cannot be based on mere speculation and substantial evidence has to be of such a nature, both in quality and quantity, that it would persuade a reasonable mind that a declared premise is, in fact, true (See Standard of Review and Authorities). Evidence offered in the report and testimony of Dr. Stewart are not substantial enough to support her prognosis that the grandmother and the plaintiff's alleged mistrust of men, etc. would have an adverse affect on the minor child. It is extremely common for a woman to mistrust a man and have negative feelings toward him during a divorce. It is also common for a woman to have negative feelings toward a father who was not involved that much with the woman's child. Dr. Stewart's prognosis as to the future was based upon such limited information and statements that were received by the plaintiff and plaintiff's mother during a period of time when they would

have negative attitudes toward the defendant. There was no testing given to the grandmother; however, the Court gave great weight to Dr. Stewart's analysis of what type a person the grandmother was. It appears to be clear that Dr. Stewart did not particularly care for the grandmother and the Court seemed to just adopt Dr. Stewart's opinions. Even though Dr. Stewart was concerned about the alleged problems between the plaintiff and her mother, Dr. Stewart never interviewed Mr. Evans' parents or extended family (except for a short phone call to his mother) to determine their effect on Paige (Vol. I, T. 117-118).

Another fact is that Dr. Stewart stated she didn't know how children would turn out as far as interpersonal relationships are until they reached the age of 18 to 21 years (Vol. I, T. 153) but she was concerned about Paige, and from her limited information, concluded that since, in her opinion, the plaintiff didn't turn out very well that the same would be true of the minor child, Paige. It is true that the Court also would not know how the child would turn out being in the custody of the defendant and needed to make some determination as to which situation would be in the best interest of the minor child, but, the determination should be based on the present facts of the evidence presented to the Court and not the speculation of one of the expert witnesses. The Court's findings that it mostly relied

upon in awarding custody were based on speculation and not substantial evidence and should have been given lesser weight (R. 169-180, G, K, L and N).

POINT III

Section 30-3-10(2) Utah Code Annotated, specifically states that "an important factor to consider is which parent is most likely to act in the best interest of the child including allowing the child frequent and continuing contact with the non-custodial parent as the Court finds appropriate." The Court briefly alluded to defendant's contention that the plaintiff put unreasonable restrictions on the visitation of the defendant during the first 18 months of the child's life when the child was in the care of the plaintiff. However, the few minor incidents referred to by the defendant were disputed and denied by by the plaintiff (Vol. III, T. 47-48). Further, the Court stated that it was understandable that the parties would have problems concerning visitation (Vol. III, T. 47). Obviously, when two parties are fighting for custody there is going to be disagreements in regards to the visitation. However, there was never a finding by the Court that the plaintiff did not comply with the Order of the Court in regards to the visitation. In fact, pursuant to the Court Orders the defendant had almost twice as much visitation as that which was awarded by the Court to the plaintiff after the change of custody.

Directly relating to the visitation issue is the abuse of discretion by the Court in limiting the visitation awarded to the plaintiff wherein she was denied overnight visitation with the minor child when the Court had the evidence before it that the child had been in plaintiff's exclusive custody, day and night, during the preceding 18 months. There is no question that the plaintiff had a close bond and relationship with the minor child and that it would have been in the child's best interest to have had the plaintiff still involved in the minor child's life on an overnight basis since that had been the situation for approximately 18 months. However, the Court, for some unknown reason, was not concerned with the best interests of the child in regards to disrupting the relationship that the child had with the plaintiff. This is another example of the reliance by the Court on the evaluation and recommendation of Dr. Stewart as to visitation rather than the Court looking at all of the evidence and making an independent determination in regards to what would be in the best interest of the minor child. It just doesn't make sense to limit the visitation of the plaintiff with the minor child to one day during the week and a couple of hours during a week night. This was not the same circumstance where the primary caretaker retained custody of the minor child and the visitation was awarded to the non-primary caretaker where overnight visitation may be disruptive. In this case the minor

child had spent overnight with the plaintiff for 18 months and it seems incredible that the Court would not determine from its own common sense that, in fact, it would be in the best interests of this minor child to allow some of that overnight visitation to continue with the plaintiff when the Court changed the custody. It is also hard to understand how the Court could believe that by making such a drastic change in the circumstances of the minor child by changing custody that it would not be traumatic for said child when the court limits visitation with the primary caretaker, the plaintiff.

Not only did the Court abuse its discretion in regards to limiting the visitation but it committed error by failing to make adequate findings of fact to support the restrictions placed upon the visitation (R. 169-180). There was no finding other than the Court's adopting the recommendation of Dr. Stewart as to plaintiff's visitation. However, Dr. Stewart's recommendation did not specify any facts that supported her recommendation under the circumstances of the present case. The Court needs to enter sufficient findings setting forth any special or unusual circumstances that would justify the restricted visitation awarded to the plaintiff. Apparently, said visitation was punitive in nature since it awarded plaintiff considerably less visitation time with the minor child than the defendant was entitled to exercise during the pendency of the proceedings when,

in fact, the plaintiff had previously had the sole care, custody and control of said minor child. See Carlson v. Carlson, 584 P.2d 864 (Utah 1978).

Further, plaintiff filed a Motion for New Trial and Objection to Findings of Fact (R. 186-193) and argued that the Court's award of minimal visitation was not only contrary to case law in the State of Utah but the findings as to said award were insufficient. In fact, there were no findings as to why plaintiff's visitation was so minimal. The Order of the Court denying plaintiff's Motion (R. 221-222) allude to various expert witnesses supporting said Order, but the Court's findings didn't mention any such thing. Plaintiff's expert witness, Dr. Swaner, did talk about overnight visitation of a small child, assuming that the child would be leaving the primary caretaker's environment, but that was not the circumstances in the present case. However, Dr. Swaner stated that Paige should stay with plaintiff and her sister, Brandi, since plaintiff had provided a stable home, the children were thriving and no reason to disturb status quo (Vol. III, T. 29). But the Court found Dr. Swaner's testimony not persuasive or credible (Addendum "B", p. 11).

POINT IV

The Trial Court has discretion in regards to the distribution of the debts; however, it is an abuse of that

discretion if the distribution is inequitable based upon the parties' financial circumstances (See Standards of Review and Authority). Although the Findings of Fact indicate the parties acquired debts and obligations and each party would be responsible for those in their name, there is neither a stipulation by the parties entered upon the record or a finding of the Court in regards to said debts so there is no evidence before the Court in regards to the debts and obligations that each of the parties are required to pay except for the debt to Dr. Stewart and the child care costs incurred by the plaintiff prior to the time of trial (R. 169-180). The Court found that the plaintiff's income was $1,456.00 and the defendant's income was $2,393.00 or approximately $950.00 more than the plaintiff. However, the Court ordered the plaintiff to pay one-half of the custody evaluation which is a disproportionate amount of the debt based upon the disparity of the incomes of the parties. Further, plaintiff's available income would decrease based upon the fact that she was ordered to pay child support and one-half of the daycare expenses and receive no alimony. Therefore, it appears to be an abuse of discretion to order her to pay a disproportionate amount of the only debt that was before the Court. Again, there is no finding by the Court in regards to why the Court ordered the plaintiff to pay one-half of said debt when there was such a disparity of income between the parties.

POINT V

The Court committed error in failing to grant plaintiff a judgment for her day care expenses and arrearages. The Court specifically ordered the defendant to pay to the plaintiff one-half of all day care expenses incurred during the pendency of the action (R. 83-86). Plaintiff testified that she had, in fact, incurred day care expenses for Paige and paid the same and that the defendant had failed to pay his one-half of said amount. An exhibit was received into evidence reflecting the same (Vol. I, T. 41, 42, 43). On cross-examination the plaintiff did not give conflicting evidence as the Court concluded in its ruling (Addendum "B"). Plaintiff never indicated that the day care costs she was requesting were for her minor child, Brandi. In fact, the evidence was clear that the minor child, Brandi, had always been with the nanny day care provider during the period of time that the defendant was ordered to pay to the plaintiff the day care costs for the minor child, Paige (Vol. I, T. 86-87). There was no basis for the Court to deny plaintiff's claim for reimbursement of the day care costs since the same was ordered by the Court, it was incurred by the plaintiff for Paige's care only and there was no evidence to support the Court's conclusion that some of the money was for the day care of the other child, Brandi. The Court erred since the plaintiff more than adequately met her burden of proof in regards to said issue.

SUMMARY

The failure of the Trial Court to fully consider "the best interests of the minor child in determining the award of custody" was error and abuse of discretion where the Court failed to give sufficient weight to the fact that the plaintiff was the primary caretaker during the entire marriage and the stability and continuity of the custodial arrangement had been positive and favorable to the minor child and where the evidence supported the plaintiff in regards to other specific factors pertinent to custody decisions. The Court's award of custody was not consistent with the standard set by the Appellate Courts. The over-emphasis by the Court on the evaluation and recommendation of Dr. Stewart that was based mostly on speculation further emphasized the abuse of discretion by the Court. The Court's award of custody that was based primarily on its determination that the plaintiff would pass onto the minor child a dysfunctional environment was pure speculation and the Court, by disregarding the evidence in regards to the minor child, Brandi, and the effect of the alleged dysfunctional environment on her committed an abuse of discretion and error. Said factor should not have been given such great emphasis over the other factors. The evidence was not taken as a whole and by giving greater weight to the recommendation of Dr. Stewart the decision of the

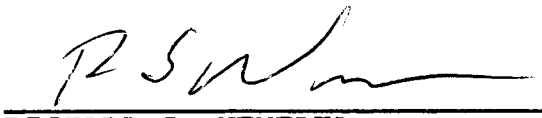
Court to award custody to the defendant was an abuse of discretion and should be reversed and custody awarded to the plaintiff.

The lack of findings in regards to the restricted visitation awarded to the plaintiff and the lack of concern by the Trial Court as to the effect on the minor child of said restricted visitation is also an abuse of discretion and said award of visitation should be reversed and plaintiff should be awarded reasonable visitation based upon the circumstances in this case in the event that custody is not reversed.

The Order requiring the plaintiff to pay one-half of the custody evaluation is not fair and equitable and should be reversed and remanded to the Trial Court for a redetermination in regards to the allocation of said debt.

The Court's denial of plaintiff's claim for reimbursement of the daycare expenses should be reversed and plaintiff should be awarded the same.

Respectfully submitted this 12th day of August, 1993.



RICHARD S. NEMELKA
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Appellant's Brief to Randy S. Ludlow, Attorney for Defendant, 311 South State Street, Suite 280, Salt Lake City, Utah 84111, this 12th day of August, 1993, postage prepaid.

Exhibit 11

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Client Copy

Evans v. Evans
Civil No. 904904449 DA
Recommendations

Custody

Of the two natural parents, Mr. Evans is emotionally more stable and has a better and more realistic appreciation of the value of family life, both of which are important in the long term development of children. Mrs. Evans has developed her values and attitudes toward fathers and extended family from her own dysfunctional family structure that excluded fathers from contact with or participation in their children's physical and psychological growth.

Other factors bearing on this recommendation include some that favor custodial care by Mrs. Evans, some that favor custodial care by Mr. Evans, and some factors that are relevant to the custody of older children but are not relevant to children in Paige's age group (1 yr./infants)

Child Related Factors

1. The preference of the child can only be indicated by the relationship between the child and the parent. Resistance to being held, consistent anxiousness to leave one parent for the arms of the other parent, whininess, refusal to make eye contact, or efforts to avoid being held are strong signs of the child's preference for the care and comfort of one parent rather than the other. There were no such behavioral signs of Paige's preference for either Mr. or Mrs. Evans. Both parents are sought-after sources of comfort and attention.

2. Keeping siblings together allows children the benefit of companionship, opportunities to learn, to share, care for, compete, or reconcile, all of which are important elements in socialization. Furthermore, sharing the values of one parent gives the children more in common as they grow than is the case if each child absorbs different values due to each child being raised by a different parent. These considerations favor Paige's custody with her mother.

3. Changing the custodial situation can be traumatic for children who have become accustomed to one home and who are not accustomed to the lifestyle and routine of care in the other home. However, infants and young children who leave the residential home for day long visits with or care by aunts, grandparents, and daycare providers become accustomed to being cared for by these people and they make a transition from one residential home to another quite easily. It is after a child begins to have a sense of belonging or ownership of his/her surroundings that changes are more difficult. At Paige's age (one year in December of 1991) she can easily transfer between her parents' homes since both of them are familiar and she has not yet identified one or the other as particularly hers. While there is preference for not changing the custodial arrangement of the child if the child is happy and well-adjusted, there is also no reason to not change it if the change would not in and of itself be traumatic and if other factors argue for such change as it is in this case.

Parent-Child Related Factors

4. The parent-child bond is equally strong for Mr. and Mrs. Evans. Both parents have a positive sense of obligation to and responsibility for Paige's nurturing and protection. Neither parent assumed this responsibility because of guilt or worry about what other people would think. Both parents regard Paige as their child whom they want to parent. This factor does not discriminate between Mr. and Mrs. Evans.

5. The quality of Paige's present custodial situation at this time (Mondays and Tuesdays from 8:00 a.m. until 6:00 p.m. every other week and Sundays and either Monday or Tuesday from 8:00 a.m. until 6:00 p.m. on the alternate week with Mr. Evans and the rest of the time with Mrs. Evans is satisfactory as far as meeting Paige's physical needs is concerned. However, within a year Paige will begin to sense the negative and exclusionary behavior and comments regarding Mr. Evans by Mrs. Evans and especially by Paige's grandmother, Mrs. Kaye Pack, who cares for Paige during most of her waking hours three or four days a week. Mrs. Pack's attitude that fathers are superfluous to women who can make it on their own deprives Paige and her half sister, Brandie (and has deprived Mrs. Evans) of the opportunity to benefit from a father's affection and guidance and the emotional contributions of his extended family. No child can be happy or well-adjusted when raised by one parent who discourages or

excludes the other parent. Paige's satisfactory adjustment at this time is only temporary. She will not be well-served by being in the custody of her mother who has an antagonistic attitude and whose chief comforter and source of guidance, her own mother, also has negative and antagonistic attitudes toward men as fathers. This is particularly true considering that Paige is also happy and well-adjusted in her father's care. There is no reason to think that Paige will not be as happy with her father on a full time basis as she is now with her mother five days a week. If she were living with him she would have the opportunity to be part of her mother's and her father's extended families who are anxious to be part of her life. This factor favors Mr. Evans.

Parent Related Factors

6. Mr. and Mrs. Evans differ considerably in their qualities (personality make-up, problem-solving skills, emotional control, rational thinking, and empathy). Both parents are bright people who have adapted well to being resourceful, prudent, and economically and psychologically independent. However, Mr. Evans is emotionally more stable, sets good long-range goals, uses rational problem-solving, and is not vulnerable to changing standards or goals. He is also more sensitive to and concerned about the feelings of other people than is Mrs. Evans. Mrs. Evans is capable of rational thinking but her judgment is flawed by her own conflicting values and competing interests (financial independence and personal freedom vs. social stability and economic conservatism) and by a serious mistrust of men as well as by insensitivity to other people's feelings. Lastly, her problem-solving is imperiled by emotional volatility, impulsive decisions, and by changing ideas about what is of value. She is primarily preoccupied with her own economic comfort and independence and has not practiced the art of making sacrifices for other people or for mutually agreed-upon goals. This factor favors Mr. Evans.

7. The attitudes of parents and of their relatives toward the other parent tells the child what she can be proud of and how safe it is to love and affiliate with the other parent and that other parent's family. Paige is the beneficiary of her mother and her maternal grandmother's negative attitude toward fathers and their assumption that fathers are not important or necessary in a child's life. Mr. Evans is regarded by them as being inadequate in the "macho" qualities of a man, unreasonable in his religious beliefs, and abnormal because he voluntarily exercises parental responsibility for the physical care of an infant. This

attitude is not only unfortunate but very destructive because it equates responsible parenting by Mr. Evans with weakness and abnormal intent. Although Mr. Evans feels that he can provide better parenting for Paige than can Mrs. Evans, he has not formed an attitude toward her that denigrates her as a person or arouses suspicion about her "normalcy". His criticism are specific: 1) her emotional volatility and impulsiveness creates insecurity in her life and may endanger her children and affect their welfare; and 2) her emphasis on having enough money to satisfy her desires is a poor standard for family relationships and establishing values in life. He accepted her "partying" past and declaration of intent to change to a different lifestyle and he did not engage in labeling or name-calling that calls into question her character. In this respect Mrs. Evans' attitude toward Mr. Evans is very harmful and his toward her is not harmful. This factor favors Mr. Evans.

8. Mr. and Mrs. Evans' emotional stability reflects long-standing personality traits and ways of adjusting to challenges. They are not merely situation-related, temporary states in either parent. Their attitudes, values, and behavior patterns have been consistent over the years and are likely to continue in the future. Mr. Evans' attitudes, values and behavior patterns are far more likely to produce a stable home life and positive emotional and social development than are Mrs. Evans' attitudes, values, and behavior patterns which have led to impulsive behavior, indecision, and difficulty in selecting and maintaining mutually satisfying interpersonal relationships. This factor favors Mr. Evans.

9. Both parents are sincerely motivated to carry out parental responsibilities and are equipped to do so on a practical basis. Neither parent is seeking custody for economic gain or to hurt or humiliate the other parent. Both parents could meet the physical and economic requirements of parenting. However, Mr. Evans has the ability to meet the emotional needs of growing children because he is emotionally more stable and has a tradition of family interaction. * This factor alone does not differentiate the parents significantly enough to weigh heavily in custody.

10. Surrogate care will be required by both parents and it has been provided by Mrs. Evans' mother, Mrs. Pack, three or four days a week so far. * Mrs. Pack's care meets Paige's physical needs but will be inadequate and harmful emotionally as Paige matures and is exposed to the distorted family values (or lack of them) that marks Mrs. Pack's attitudes toward Paige's grandfather

and father. Mrs. Pack's destructive attitude figures as a negative factor for Mrs. Evans.

11. Of the function-related factors, Mrs. Evans and her mother have been Paige's primary caretakers except for two days per week when Mr. Evans takes care of Paige during the daytime. The role of primary caretaker was defined by Mrs. Evans who did not want to live with Mr. Evans and who arranged for her mother to provide care for Paige during the day. Paige has spent most of her time since her birth a year ago (and during the pendency of this divorce proceeding) with her mother because Mrs. Evans made that arrangement when she elected to dissolve the marriage a few weeks after Paige was conceived. However, Mr. Evans has performed all of the daily functions for care of Paige on two days per week and was limited only by Mrs. Evans, not by his own motivation. This factor does not differentiate significantly.

12. Neither parent can be flexible in adapting work to child care. Mrs. Evans' job is an 8:30 to 5:00 job five days a week and Mr. Evans works approximately from 9:00 a.m. to 7:00 p.m. on Thursday through Friday, allowing him three days off from work.

13. The stability of Mr. Evans' environment is superior to that of Mrs. Evans and favors Mr. Evans. (what facts)

Tallying the factors that favor each parent is less significant than the fact that Paige was conceived because of impulsive decisions, poorly thought out values, and strongly conflicting needs that produced a great deal of pain and anxiety. While strongly attached to and protective of her children, Mrs. Evans' lifestyle, emotional volatility, and dysfunctional family relationships put Paige's development in considerable jeopardy. Mrs. Evans has accepted the dysfunctional quality of her family relationships but Paige should not be subjected to a third generation of such emotional conflicts.

Visitation

Mrs. Evans should have visitation every Saturday from noon until 6:00 p.m. and every Wednesday from 6:00 until 8:00 p.m.

Paige will spend Martin Luther King Day in January with her mother and will spend Presidents Day in February with her father.

Paige will spend Memorial Day with her father.

Paige will spend July 4th with her mother when it does not fall on a Sunday, Monday or Tuesday. She will spend July 4th with her father when it does fall on a Sunday, Monday or Tuesday.

Paige will spend July 24th with her mother when it does not fall on a Sunday, Monday or Tuesday and she will spend July 24th with her father when it does fall on a Sunday, Monday or Tuesday.

Paige will spend Labor Day with her father.

Paige will spend Thanksgiving Day on odd-numbered years with her mother from 1:00 until 6:00 p.m. and shall spend even-numbered years with her Father.

Paige will have a visit with her mother on Christmas Eve Day from 5:00 p.m. until 8:00 p.m. On Christmas Day she will have a visit with her mother from noon until 4:00 p.m. When Paige is of school age she will have an additional visit with her mother three school days during the school holiday if her mother is off work and is at home with her on those days.

Paige will have a one week visit with her mother when she is age four in the summer if her mother is off work. When she is five years old she can spend two weeks with her mother.

Paige will visit her mother on Mother's Day from noon until 6:00 p.m. if she is not otherwise with her.

Paige will spend from 6:00 until 8:00 p.m. with her mother on her mother's birthday. Paige will also have a visit with her mother and half sister, Brandie, on Brandie's birthday or at such time as it is celebrated.

Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychology

EBS:nr

ADDENDUM 15

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

TORI K. EVANS, Plaintiff, vs. ROBERT L. EVANS, Defendant.	Case No. 904904449DA REPORTER'S TRANSCRIPT OF JUDGE'S RULING

REPORTER'S TRANSCRIPT OF JUDGE'S RULING

THE HONORABLE J. DENNIS FREDERICK

June 2, 1992

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* * *

THE COURT: The parties and their counsel are present.

Having taken this matter under advisement, further considered the exhibits received, the testimony elicited, I am prepared to rule at this time.

In this matter the plaintiff Tori Evans, now known as Woods, seeks a divorce from the defendant on the grounds of irreconcilable differences in the instant matter, that is, this case number D-90-4449, filed on November the 5th of 1990.

In case number D-91-25 filed on January the 30th of 1991, the plaintiff in that action, Robert Evans, seeks the same relief.

The two actions were consolidated by order of this Court on the 8th of February of 1991. The Complaint in the later action filed is treated herein as a Counterclaim.

The evidence establishes that both parties are entitled to a divorce on the grounds of irreconcilable differences and each is granted the same.

The parties have stipulated on their respective incomes for purposes of support pursuant to the Uniform Child Support Guidelines set forth in Exhibit 6, the worksheet. Additionally, they have agreed that no alimony should be awarded, that the defendant is to maintain health and accident

insurance on the child Paige, that the parties are to share equally the cost of all medical, dental expenses not covered by insurance, that the personal property as currently divided is to be awarded to the respective parties, and these stipulations are accepted by this Court.

The parties reserved for trial the payment of Dr. Stewart's fees which were initially paid by the defendant. This Court now orders the plaintiff to reimburse the defendant for one-half of said costs proffered at the sum of $3,000. Judgment is awarded in behalf of the defendant against the plaintiff in the amount of $1,500.

Additionally, the plaintiff claims the defendant owes her for certain child care expenses incurred by payments to her mother set forth in Exhibit 3. The evidence is conflicting as to whether or not these sums, $1,100, were paid for Paige's care only. The plaintiff, in this Court's view, has failed in her burden of convincing this Court that this was the case. Accordingly, that claim is denied.

The overriding issue in both divorce actions is the claim for custody of Paige, the parties' minor daughter, whose date of birth is December the 18th of 1990. The parties, by stipulation of June the 21st of 1991, agreed to have an independent custody evaluation pursuant to Rule 4-903 of the Code of Judicial Administration to be conducted by Elizabeth Stewart, PhD. psychologist, which was accomplished

and the report filed on January the 1-th of 1992 and received as Exhibit 8.

This is a close case. Neither parent here is a "bad" parent. Both have many commendable attributes, but unfortunately, it falls upon this Court to decide the custody issue, and I must decide that issue in accord with what I deem to be the best interests of the minor child Paige who is, after all, my primary concern.

Dr. Stewart testified that in preparation of her report, she conducted interviews with the defendant, with the defendant's mother, with the plaintiff, some five different times, with the plaintiff's mother, with the plaintiff's father, the pediatrician of the child Dr. Thomas, the day care provider, the plaintiff's stepmother. She observed Paige in the presence of both parents. She observed Paige with her stepsister Brandie. She performed diagnostic evaluation tests including the MMPI, the Rotter sentence completion test, custody questionnaire, and these activities were performed over a course of two to three months, a period from October of '91 to and including December of '91.

Dr. Stewart's recommendations are challenged by Dr. Swaner, plaintiff's psychotherapist for two years, who, by her own admission, hasn't observed the child in relation to either parent, made no third-party contacts, only saw the defendant twice, and is unaware of the requirements of

Rule 4-903, Code of Judicial Administration, and has done no custody evaluations since 1988.

Dr. McManemin likewise challenges Dr. Stewart's recommendations, yet by her testimony has had no contact with the defendant, made no third-party contacts, observed no parental interaction with the child, and only did an evaluation of Brandie for approximately two and one-half hours about two weeks ago.

Experts, of course, disagree in this case. This Court, therefore, must conclude which recommendations are more satisfactory, convicing and persuasive. In deciding custody cases between competing parents, this Court must consider a number of factors which are set forth in Rule 4-903, Code of Judicial Administration, and those factors are as follows, inter alia, the preference of the child, the benefit of the siblings remaining together, the strength of the child's bond to the respective parents, the benefits and/or disadvantages of continuing the present custody arrangement, the moral and/or emotional stability of the parents, the duration of the desire for custody, the necessity of surrogate care for the child, the presence or lack thereof of substance abuse or use, illicit substance abuse or use, whether custody was relinquished in the past by either of the parents, the religious compatability with the child, the kinship relationships of the child, and the

financial ability of the parents to support the child and themselves, and any other factors considered important which, in this Court's view, Dr. Stewart has done in her extensive report and testimony. The other experts have not.

Pursuant to Tile 30-3-10 and following of the Utah Code Annotated as interpreted by case law, most notably in the case of Moon versus Moon found at 790 P.2d. 52, a 1990 case, this Court must consider, in deciding what is in the best interests of the child, in addition to those factors set forth in Rule 4-903, additional elements. This Court has done so and finds as follows, and not necessarily in the order delineated in the Moon case.

The parent bond between the child and the two parents here is equally strong. Both parties have a positive sense of responsibility to Paige's nurturing and protection. The quality of Paige's present custodial arrangement, even though Paige has been, since February of 1992, after Dr. Stewart's report was issued, been placed in day care rather than in the care of the plaintiff's mother, this arrangement, in this Court's view, is problematic.

The plaintiff's attitude toward the defendant, which is unduly influenced by her mother, is negative and exclusionary. Her unreasonable restrictions on visitation is one example of her antagonism toward the relationship of Paige to her father.

These factors, convincingly expressed by Dr. Stewart in both her report and her testimony, in this Court's view, outweigh the circumstance of the child having been in the temporary custody of her mother during the pendency of these proceedings. The emotional stability and the character of the defendant, in this Court's view, is superior to that of the plaintiff.

While both parents are resourceful, economically and psychologically independent, the defendant is emotionally more stable. He has a better, more realistic appreciation of the value of family life and is more likely to produce a stable home environment with positive social and emotional development on behalf of the child Paige. He sets, as Dr. Stewart has convincingly testified, long-range goals, is rational in his approach to problems, and not vulnerable to change in standards. He is less impulsive and more sensitive to the concerns of other people.

Plaintiff, on the other hand, the evidence has established, has evidenced emotional volatility and an insensitivity to the feelings of others. She is primarily concerned with her own economic comfort. Her judgment is flawed, as has been testified to convincingly by Dr. Stewart, by conflicting values. She seriously mistrusts men. Her problem-solving is imperiled by emotional volatility, and she is not interested in making sacrifices.

The preference of the child, according to the testimony of Dr. Stewart, seems to be more or less equal. That testimony is persuasive to this Court.

The element of keeping the siblings together, of course, is a serious issue and that, of course, argues in favor of continued custody with the plaintiff. Yet, the plaintiff chose from March of 1991 to February of 1992 to, in large part, rear the children apart, Brandie in day care and Paige with her grandmother.

At this stage I am persuaded, according to the testimony that's been received, the child does not share an interest or comfort and care for the other child, Brandie, that is, at this early stage of development, I am persuaded that the long-term bonding issue has not yet arisen to the point where it would create undue trauma for a transfer.

The claim of the plaintiff and her mother that the defendant is unreasonable in his religious beliefs and is abnormal because he wants to exercise parental responsibility for the physical care of the child is not borne out by the evidence. Moreover, this attitude, according to the credible and persuasive testimony of Dr. Stewart is destructive to the child's development.

The defendant's views of the plaintiff are more specific and rational. He does not convey his negative feelings toward the plaintiff to the child, and plaintiff and

the plaintiff's mother, as they have in the past to Brandie, they will, in all likelihood, result in the same sorts of negative feelings being developed in Paige.

The plaintiff has evidenced emotional instability in certain particulars that have been borne out by the evidence. For instance, dating the defendant before she was divorced, seeking to move the marriage up in terms of time, having experimented in the past with illicit substances, to-wit, cocaine, having abused alcohol in her prior marriage, having had an illicit sexual liason, having abnormal reliance on her mother, having concluded almost immediately her need to terminate the marriage, and barring the defendant from the child's birth; moreover, not consulting the defendant with regard to naming of the child and not even advising him of the child's birth until four days after it occurred.

Moreover, it is my view, and I'm persuaded the evidence supports that view, that she holds the belief that one parent, the mother, should raise the child, the father should leave them alone, and this is brought forth in Exhibit 7, her handwritten letter.

Surrogate care is, of course, required, no matter which parent receives custody, but given the defendant's work schedule and anticipated work schedule, it is more flexible than the plaintiff's, which would result in less

surrogate care for the child than if the plaintiff had custody.

The defendant has established his ability to provide for the day-to-day care of Paige during his considerable visitation arrangements, and I am persuaded that, based on his testimony as well as that of Dr. Stewart and others, that he is perfectly capable and able to care for this minor child.

Changing the custodial arrangements can certainly be traumatic, and I am certainly aware of that problem. However, I believe that the persuasive evidence her has established that in Paige's case, being now 18 months old, she can make the transition from one household to the other without the typical attendant trauma. She has not yet developed a sense of belonging or ownership to one parent as opposed to the other. Indeed, most of her life she has been cared for by surrogates, her grandmother and then day care and has moved, made the transition from the plaintiff's to the defendant's home without convincing evidence of trauma during visitation exercised.

The defendant has compatible religious values with the child and a more stable extended family than the plaintiff.

This Court is persuaded that Paige's best interests would be served by the transfer of the primary care to the

defendant. He is the more emotionally stable and dependable of these two parties.

The plaintiff's lifestyle, her emotional volatility and dysfunctional family relationships put Paige's development in jeopardy.

This Court adopts the recommendations of Dr. Stewart as being reasonable, credible and persuasive and finds, on the contrary, the testimony of Doctors Swaner and McManemin not to be so persuasive and credible.

Plaintiff is awarded the visitation at a minimum set forth as recommendations contained in Dr. Stewart's report, Exhibit 8, excepting that rather than a half day on each Saturday, the plaintiff shall be awarded one full day each Saturday from 9 a.m. to 6 p.m. In all other particulars at this time the visitation schedule recommended by Dr. Stewart is adopted by this Court.

The physical transfer of the child is to take place Tuesday, that being tomorrow, at a time that is convenient to the parties. I would anticipate, given the work schedule of the parties and I have no knowledge as to what that would be, that sometime in the morning would be the appropriate time to actually transfer the physical custody of the child, and I will set a time of ten o'clock a.m., unless the parties are able to agree otherwise.

The defendant is awarded child support pursuant to the

Uniform Child Support Guidelines, based upon the incomes of the parties reflected in Exhibit 6.

Each party is to bear their own attorney's fees.

Mr. Ludlow, you prepare the Findings of Fact, Conclusions of Law and Decree, submit those to Ms. Christian for approval as to form.

MR. LUDLOW: I will do so, sir.

THE COURT: Are there any questions, counsel?

MR. LUDLOW: No, your Honor.

THE COURT: Very well. Court will be in recess.

(Whereupon, the proceedings were concluded.)

* * *

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss
COUNTY OF SALT LAKE)

I, ANNA M. BENNETT, do hereby certify:

That I am a Certified Shorthand Reporter, License No. 220, and one of the official court reporters of the state of Utah; that on the 1st day of June, 1992, I attended the within matter and reported in shorthand the proceedings had thereat; that later I caused my said shorthand proceedings to be transcribed into typewriting, and the foregoing pages, numbered from 2 to 12, inclusive, constitute a full, true and correct account of the Judge's Ruling, to the best of my ability.

DATED at Salt Lake City, Utah, this 2nd day of June, 1992.

Anna M. Bennett, CSR

ANNA M. BENNETT, CSR

Addendum C

ELIZABETH B. STEWART, Ph.D.
A PROFESSIONAL CORPORATION
DIPLOMATE, CLINICAL PSYCHOLOGY
SUITE 900 VALLEY TOWER
50 WEST BROADWAY
SALT LAKE CITY, UTAH 84101
(801) 363-6644

Client Copy

Evans v. Evans
Civil No. 904904449DA
Observations of Paige Evans

Paige will be one year old in December of 1991. She is a very alert, responsive, and good-natured child. According to both parents and her pediatrician she is passing developmental milestones of early infancy in a normal fashion. She is very affectionate and responsive to people and is quite outgoing.

Paige presents no problems in parenting to either her mother or her father. Her good nature, quick learning, and delight in being with other people make her an easy child to handle.

At the present time Mrs. Evans complains that Paige is over fed by Mr. Evans and that she does not sleep through the night after visits with him. However, it is more likely that these problems are related to the tension between Mr. and Mrs. Evans rather than to Paige's being with her father per se. Problems of this sort are never reported by parents who are living together and they typically are related to the separation, divorce and attitudes of the parents rather than to the actual relationships between parent and child.

Paige would adjust to being in the custody of either parent.

Elizabeth B. Stewart, Ph.D.
Diplomate, Clinical Psychology

EBS:nr

ALTA VIEW CENTER FOR COUNSELING
A DIVISION OF WASATCH CANYONS HOSPITAL
9690 South 1300 East, Suite 220, Sandy, Utah 84094, (801) 572-5001

October 22, 1992

RE: Paige Evans
Age: 21 months

To Whom It May Concern:

At the request of Tori Woods, I am writing to verify the fact that I evaluated her daughter, Paige, on 10/1/92 and 10/17/92 for emotional and behavioral problems.

Paige has very limited visiting privileges with her mother and it appears to have taken its toll. Clinical observations and informal play therapy revealed a child more cautious and suspicious than would be expected of a child Paige's age. She appears to have reached developmental milestones appropriately, but socially she appeared guarded, suspicious, and anxious. Her interactions with mother and sister were warm and loving. She felt secure and comfortable in their presence.

My concern is the minimal time Paige is allowed to spend with her mother. Children benefit from having a positive experience with both parents in their lives. Young girls have a better prognosis when they can experience positive role modelling from an appropriate mother figure. My clinical judgment is that Paige and her mother need more time with each other. Page is fortunate that both of her parents express and exhibit deep love and concern for her. I support a re-examination of Paige's custody and visitation arrangements to facilitate optimal development of attachment and bonding with both parents.

If you need further information from me, feel free to contact me at (801) 572-5001.

Sincerely,

Cheri S Reynolds, PhD

Cheri S. Reynolds, Ph.D.
Psychologist

SOCIATED BEHAVIO.. NSULTANTS, INC.

ast Murray-Holladay Road
11
ke City, Utah 84117
72-5083

Addendum E

August 13, 1992

To Whom It May Concern,

After having met with Paige Woods several times, it was striking to note the difference in her behavior and appearance. Two months ago Paige was a happy, outgoing girl with lively affect, who made outreach quite easily and occupied herself well. She held good eye contact and smiled frequently. When I saw her recently on August 8, 1992 after not having seen her for several weeks her behavior and appearance had changed significantly. She was clingy with her mother, had a scowl on her face most of the time, displayed a short attention span and low frustration tolerance and did not accept outreach from anybody but her mother, let alone approach anybody else. Furthermore, Paige avoided eye contact and became apprehensive at the sound of the slightest noise outside, suggesting a serous decrease in her general level of comfort and equilibrium.

These are warning signals that Paige is not adjusting well to her new schedule and environment and should be further investigated.

If you have further questions or need more information, please, contact me at 272-5083.

I hope that this is helpful to you.

Sincerely,

J. F. McManemin

Johanna F. McManemin, Ph.D.